No. 10036

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CYRUS E. AVERILL, JR.,

Appellant,

vs.

FRANCIS F. QUITTNER *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

NAT ROSIN,
624 Board of Trade Building, Los Angeles,
Attorney for Trustee.

DAVID C. LEVENSON and
KENNETH E. MATOT,
1102 Bank of America Building, Los Angeles,
Attorneys for Floyd C. Balding.

Parker & Baird Company, Law Printers, Los Angeles.

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APPELLEES' REPLY BRIEF.

The record in this matter appears to present only three questions to be determined by the Court, namely:

1. Whether or not fraudulent transfer occurred within one year of the date of the filing of the petition in bankruptcy;
2. As to whether or not the appellant in this matter has sustained the burden of proof that was shifted to him under the provisions of Section 14-(c) of the Bankruptcy Act;
3. Whether or not the specifications of objection to the discharge are sufficient and if any question as to the sufficiency may be raised for the first time on appeal.

These questions will be discussed in the order given.

Statement of Case and Questions Presented.

The facts as disclosed by the records are as follows:

The bankrupt was engaged in the cafe business in the City of Los Angeles on the 21st day of July, 1939; one of the appellees, Floyd C. Balding, secured a judgment against the bankrupt, Cyrus E. Averill, in the sum of approximately $3,600.00. On July 25th, 1939, four days later, and before the said Floyd C. Balding could have secured an execution in said case in which said judgment was entered, there was recorded in the office of the County Recorder of Los Angeles County a chattel mortgage dated March 15th, 1939, covering the fixtures and equipment of the bankrupt's cafe business; said chattel mortgage being given to one Glen E. Bodell to secure a promissory note executed by the bankrupt in favor of Glen E. Bodell under date of March 15th, 1939; that at the time of the hearing in the bankruptcy matter Glen E. Bodell testified that this note was given to secure antecedent advances made to the bankrupt herein.

On the 25th day of July, 1939, there was also recorded a mortgage dated March 15th, 1939, covering the real property upon which the home occupied by the bankrupt and his wife is located. This mortgage was given to said Glen E. Bodell to secure a note executed by the bankrupt under date of March 15th, 1939. Likewise, on said July 25th, 1939, the said Bodell gave notice of his election to foreclose the said chattel mortgage and a few days later Bodell became the owner of the assets covered thereby at

foreclosure sale. Thereupon Bodell transferred the said assets to a corporation known as the Paradise Cafe, Inc., which he had caused to be formed, and thereafter the business heretofore conducted by the bankrupt was carried on in the name of the corporation with the bankrupt acting at all times as manager, except, perhaps for a brief period immediately following the transfer of the said assets to the corporation. It should be noted further that at the time the Paradise Cafe, a corporation, filed its petition in bankruptcy, the said petition was executed on behalf of the said corporation by the bankrupt herein as president of the corporation.

On January 24th, 1940, Floyd Balding commenced an action in the Superior Court of the County of Los Angeles to set aside the aforesaid chattel mortgage and also the mortgage covering the real estate of the bankrupt. This action was heard on June 5th, 1940, and the trial judge made his decision in which he held that the two mortgages involved were fraudulent and void as against the said Floyd C. Balding. A decree of the Court was not entered until July 2nd, 1940. [Tr. p. 59 *et seq.*]

In the meantime, on June 18th, 1940, the bankrupt filed his voluntary petition and also a petition on behalf of the Paradise Cafe, a corporation. All of the assets owned by the bankrupt were listed as assets of the Paradise Cafe, a corporation, and not of the bankrupt, Cyril E. Averill. Subsequently thereto the appellees herein filed specifications and objections to the discharge of the bank-

rupt, which were duly heard before the Referee in Bankruptcy, and the Referee filed his memorandum of decision upon the objections to the discharge. [Tr. p. 12 *et seq.*]

The testimony had at the hearing of the objections to the discharge was as set out on page 63 *et seq.* of the transcript.

We believe that it is quite important to keep the following facts in mind in considering the first question, namely: That the chattel mortgage and mortgage hereinbefore referred to were dated March 15th, 1939, but were not recorded until July 25th, 1939. No testimony was offered by the bankrupt as to when delivery was made of these documents and the Court found that delivery was made on the date the instruments were recorded, that is to say, on July 25th, 1939.

Summary of Argument.

Appellees contend that all the errors relied upon by the appellant must be resolved against the appeal, principally because the appellant in the first instance failed to meet the burden of the evidence which was shifted to him upon the making of a *prima facie* case by the appellees. This burden the appellant has failed to meet.

ARGUMENT.

I.

Evidence Introduced at the Hearing by the Appellee Was Sufficient to Make a Prima Facie Showing as Can Be Seen by the Transcript and by the Statement of the Case Made by Both the Appellant and Appellees.

It should be borne in mind that while the chattel mortgage and the mortgage in question appear to have been executed on or about March 15th, 1939, and recorded on the 25th day of July, 1939, there was no evidence offered by the appellant to prove that these documents were delivered until they were recorded, and, of course, the burden was on the appellant to show the date of the delivery, and failing in this then the Court was justified in following the law applicable in such cases.

Section 2957 of the Civil Code of the State of California reads as follows, to-wit:

> "A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value, unless:
>
> 1. It is acknowledged, or proved or certified, in like manner as grants of real property;
> 2. Place of recordation. The mortgage, if of animate personal property other than crops growing or to be grown, is recorded in the office of the Recorder of the County where the mortgagor resides at the time the mortgage is executed, or in case the mortgagor is a non-resident of this state, in the office of the Recorder of the county where the property mortgaged is located at the time the mortgage is executed;

4. The mortgage, if of personal property other than crops growing or to be grown or animate personal property, is recorded in the office of the Recorder of the County where the mortgagor resides at the time the mortgage is executed, and also in the county where the property mortgaged is located, at the time the mortgage is executed, and to which such property is thereafter removed."

It can be readily seen from a reading of the foregoing paragraph of the Civil Code of the State of California that two things must be done to make a valid chattel mortgage in this State. They are:

1. The execution and delivery of the mortgage;
2. The recording thereof.

In this connection the case of *Wolpert v. Gripton,* 213 Cal. 474, 2 Pac. (2d) 767, gives us what we believe to be the key to the question. The court in this instance said, "Recordations is designed as a substitute for delivery and change of possession."

Applying this law to the question herein presented, it must be presumed that the delivery was made at the time of the recordation, and this is what the Referee found. If that was not the date of the delivery then it was incumbent upon the appellant to meet this burden by showing the date on which the chattel mortgage was actually delivered.

In this connection the Referee in his findings said [Tr. p. 17]:

> "My conclusion in the matter is that the bankrupt has not met the burden imposed upon him as afore-

said. I am entirely convinced that one of two things happened, namely: (1) That the chattel mortgage here involved was not delivered by the bankrupt to Bodell until July 25th, 1939, the day it was recorded, or (2) that if it was previously delivered it was definitely agreed and understood between Averill and Bodell that it was not to be effective for any purpose or recorded or used unless or until the aforesaid Balding recovered a judgment against Averill."

There is no evidence in the record to overcome the conclusion reached by the Referee and the decision of the Referee may not be questioned unless there is no evidence to support his conclusions.

If delivery had been made prior to the date of recordation, the burden was upon the appellant to show such delivery. This he utterly failed to do.

Again the Supreme Court of the State of California in the case of *Ruggles v. Cannedy,* 127 Cal. 290, 46 L. R. A. 371, 53 Pac. 911, 59 Pac. 827, held that the recording of a chattel mortgage pursuant to Section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change in possession required in other cases on transfer by Section 3440 (Bulk Sales Act), and if the mortgage is not acknowledged or proved, certified and recorded as required by this section, it is void as to creditors of the mortgagor.

Manifestly, then, in order to make a valid chattel mortgage it must be recorded and the recording date of the chattel mortgage and mortgage in this matter was the 25th day of July, 1939, which was within one year of the time of the filing of the petition in bankruptcy.

II.

Has the Appellant Met the Burden of Proof as Required by Statute.

A reading of the record in this matter will show that the appellee made a *prima facie* showing at the hearing before the Referee, and that the Referee on this *prima facie* showing made his deductions which are amply supported by this *prima facie* showing, and, naturally, the findings of the Referee will not be disturbed on appeal unless some glaring error appears in the record. We submit that there is nothing in the record to support appellant's contention other than his argument which is certainly not evidence.

The above is supported by the decision of the Honorable Circuit Court of Appeals in the cases of *In re Patrizzo,* 105 Fed. (2d) 142; 40 A. B. R. (N. S.) 527; *In re Lozito,* 113 Fed. (2d) 764, 2 A. L. R. 1672.

As there was no evidence to the contrary, the Referee had no choice but to presume from the evidence that delivery was made at the time of the recordation of the instrument in question under the provisions of Section 2957 of the Civil Code, *supra,* the burden being upon the bankrupt to show to the contrary.

We also think that the fact that the Paradise Cafe, a corporation, filed its schedules, which were executed by Cyrus E. Averill, as president, and which included as assets the property heretofore belonging to said Averill, and by so doing the estate of Averill in the bankruptcy

lost one-half of its assets to the estate of Paradise Cafe, resulting in a continuation of this fraud during and after the time the trustees in the two estates had been appointed and were acting.

We think that the finding of fraud by the Superior Court is conclusive and *res adjudicata* so far as this question is concerned here, leaving the only question to be determined as to when the fraud was actually perpetrated, and we believe that the perpetration came within the one year period of the date of the filing of the petition.

The appellant lays great stress upon the fact that there was a lack of evidence in his opening brief, but we feel that lack of evidence, if any, must be borne by the appellant and not the appellees, for the reason that the burden shifted to the appellant by the provisions of Section 14-(c) of the Bankruptcy Act, *supra*. See also the cases *In re Patrizzo* and *In re Lizota, supra*.

III.

Defective Specifications Are Waived by Going to Trial on the Merits Without Objections.

The appellant dwells a great deal upon "defective specifications," but in our opinion appellant waived the right to now object to the specifications by having proceeded to trial on the merits without objection thereto.

In the case of *Osborne v. Perlcins,* 112 Fed. 127, the Court said:

> "Defective specifications are waived by going to trial on merits without objections."

Again in the case of *Huntley v. Snider,* 86 Fed. (2d) 539, the Court said:

> "It is too late to urge objections to specifications for their too great generality for the first time on appeal."

An inspection of the record will show that the appellant made no objections to the specifications at the time of trial, and by so doing they must be deemed to have waived any defect in any that might have existed in the specifications.

IV.

Conclusion.

In conclusion it appears to us:

1. That any lack of evidence in this matter as contended by appellant must be deemed due to the failure of the appellant to meet the burden of proof as required by statutes for the reason that the findings of the Referee are amply supported by the evidence as introduced by the appellee at the hearing in the first instance, and we feel that counsel has overlooked completely the provisions of Section 14-(c) of the Bankruptcy Act, and also the cases cited in support of this contention.

2. That the record as it stands is sufficient to support the judgment of the Referee and should be sustained by this Court.

Respectfully submitted,

NAT ROSIN,
Attorney for Trustee.

DAVID C. LEVENSON and
KENNETH E. MATOT,
By KENNETH E. MATOT,
Attorneys for Floyd C. Balding.